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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 146

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION No. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1–A8) is reported at 341 F. 2d 29. The Board's decision and order (J.A. 1–24) [1] are reported at 146 NLRB 509.

JURISDICTION

The decree of the court of appeals was entered on February 17, 1965 (Pet. B1–B2). The petition for a writ of certiorari was filed on May 15, 1965. The

[1] "J.A." references are to the portions of the record printed for the use of the court below.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the Union's strike against one member of a multi-employer unit to force him to discontinue sales to another member of the unit was "secondary," rather than "primary."

2. Whether the relation between the struck employer and the employer with whom the Union had its primary dispute deprived the former of his "neutral" status.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at page 3 of the petition.

STATEMENT

Old Dutch Farms, Inc. (Old Dutch) is a retail distributor of milk and related products in the New York City area, employing eight driver-salesmen who deliver milk directly to homes on four milk routes (J.A. 42, 81). Since May 1962, it has also operated a retail store at which it sells its own milk products (J.A. 4). Deliveries of milk products to the store are made by an Old Dutch driver (J.A. 42).

Old Dutch purchases its own raw bulk milk, but has no facilities for homogenizing, pasteurizing, or bottling milk. These services are performed for Old Dutch by Balsam Farms, Inc. (Balsam) on a contract basis (J.A. 53). Old Dutch also rents office

and truck storage space from Balsam, as do two other retail milk distributors (J.A. 64). In addition to Old Dutch and its two other tenants, Balsam homogenizes, pasteurizes, and bottles milk for at least four other distributors and for its own use (J.A. 64–66).[2]

Old Dutch and Balsam are parties to identical collective bargaining contracts with petitioner.[3] The basic agreement was negotiated on an industry-wide basis between representatives of the greater New York and Northern New Jersey Milk Dealers Labor Committee and representatives of three local unions, including petitioner. Separate contracts reflecting this agreement were then signed by the individual milk dealers. About 250 milk dealers have signed the same contract (J.A. 28, 42–43).

Clause 66A of the contracts provided that it would be a violation of the agreement for any signatory "to deliver to depots for the purpose of distributing or selling milk" (J.A. 8). In December 1962, petitioner, contending that this clause prohibited the operation of retail stores like Old Dutch's, instituted arbitration proceedings under the contract against

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[2] Old Dutch's raw bulk milk is delivered by tank truck to Balsam's plant and placed in the latter's tanks. It is stored, processed, bottled, and loaded onto Old Dutch's trucks by Balsam. Old Dutch pays Balsam a fixed amount per can for the various services performed. It pays an additional fixed amount per can for rental and storage (J.A. 79–80).

[3] All of Old Dutch's employees except for its four store employees are represented by petitioner. The same is true of Balsam's employees (J.A. 101, 42, 65).

Old Dutch (J.A. 9, 44–45, 165–166, 229).[4] These proceedings were in progress when the strike described below, which forms the basis for the present case, occurred (J.A. 46–47, 59–60).[5]

On May 27, 1963, at about 9:00 a.m., petitioner's vice-president and business agent went to the Balsam loading platform and instructed Balsam's manager not to put up any milk for Old Dutch because "they [petitioner] were going to close the stores, * * *" (J.A. 69). Petitioner's agents took no action until about 10:30 a.m., when the president of Old Dutch and one of his employees began taking Old Dutch milk from Balsam's refrigerator. At that point, petitioner's representatives went inside and conversed with Balsam's employees who were working there. Balsam's employees thereupon struck because Balsam had permitted Old Dutch employees to load milk from Balsam's refrigerator (J.A. 10; J.A. 48, 69–72). As the rest of Balsam's employees came to work, they were met by petitioner's agents, and, instead of reporting for work, they gathered in the parking lot (J.A. 61–62, 70–71). Pickets appeared at Balsam's

[4] Since 1957, approximately 15 milk distributors had established about 40 such stores (J.A. 57–58).

[5] After the strike was ended, the arbitration proceeding involving Old Dutch was merged with an industry-wide arbitration proceeding. The decision of the arbitrators in this latter proceeding, *In re Milk Industry*, 42 Lab. Arb. 893, was issued on May 5, 1964. Respecting the contract provision in question, the arbitrators observed that "the contract * * * was not clear with respect to the type of store about which the Unions are now complaining. It prohibited sales from trucks or milk depots except those in settlement houses and the like, but did not explicitly ban sales at company stores." *Id.* at 895.

two driveways carrying signs which read, on one side, "Unfair, milk company stores violated contract and destroy job security," and, on the other, "On strike. Unfair to Union members Local 584, IBT" (J.A. 62–63, 71–72). During the morning, pursuant to the pickets' instructions, all truck drivers making deliveries to Balsam refused to cross the picket line (J.A. 34; 72–74). The strike was ended that afternoon, when Balsam agreed to petitioner's demand to cease processing milk for Old Dutch because Old Dutch had refused to close its store (J.A. 50–53).[6]

Upon charges filed by Old Dutch, the Board found that petitioner, by its strike activity on May 27, 1963, had violated Section 8(b)(4) (i) and (ii)(B) of the Act. The Board found that petitioner's primary dispute was with Old Dutch, that petitioner had threatened, restrained, and coerced Balsam (which was "neutral"), and that it had induced and encouraged employees of Balsam to strike, all with an object of forcing Balsam to cease doing business with Old Dutch. The Board ordered petitioner to cease and desist from such conduct in the future (J.A. 2, 15–24). The court of appeals sustained the Board's findings and enforced its order (Pet. A1–A8).

ARGUMENT

The decision of the court of appeals is clearly correct, and there is no conflict of decisions. There is thus no occasion for further review.

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[6] Several days later, Old Dutch and the Union arrived at a "truce" when Old Dutch agreed that the store price of milk would be increased (J.A. 55–56).

1. Section 8(b)(4)(B) of the Act makes it an unfair labor practice for a labor organization to bring pressure to bear on a neutral or secondary employer and his employees so as to force that employer to cease doing business with another employer with whom the labor organization has its primary dispute. The Board found (J.A. 18), with the approval of the court of appeals (Pet. A5), that petitioner's primary dispute was with Old Dutch over its operation of a retail milk store. It concluded that since Balsam, Old Dutch's processor, was not involved in the operation of that store, the pressure on Balsam and its employees was "secondary" and thus violative of Section 8(b)(4)(B).

There is no merit to petitioner's contention that it was entitled to bring pressure on Balsam because Balsam and Old Dutch belong to the same multi-employer unit and Old Dutch's retail store operation imperiled job opportunities and employment standards in that unit in violation of clause 66A of the collective agreement which both had signed (Pet. 6–11). First, as the Board noted, Balsam's conduct did not violate any terms of the contract; Balsam did not "establish, service or deliver to depots for the purpose of distributing or selling milk," but merely continued to process milk for one of its many customers (J.A. 17; and see the arbitration decision, note 5, *supra*). Whether or not the customer violated the contract would not affect petitioner's right to strike Balsam. Second, even if the clause had barred Balsam from processing milk for any member of the multi-employer unit who operated a retail store, it

would not follow that pressure on Balsam to enforce that clause would be permissible. As this Court held in *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, a contract provision cannot convert conduct which would otherwise violate the secondary boycott provisions of the Act into primary conduct.[7] The determinative question is whether the contract provision bears directly on the employment conditions of the employer against whom the pressure is exerted, or whether it is really aimed at those of other employers with whom he happens to do business. If the latter be true, the clause is "secondary." See *Local 636, United Ass'n* v. *National Labor Relations Board*, 278 F. 2d 858, 864 (C.A. D.C.). Since Balsam did not establish and was not operating the offending retail store, a clause which sought to restrict his sales to that store was not aimed at Balsam's employment conditions but at those of some other employer, in this case Old Dutch. The enforcement of such a clause by pressure against Balsam was therefore barred by Section 8(b)(4)(B).

Nor is it relevant that the Union's ultimate object in enforcing such a clause may have been the perfectly legitimate one of preserving work opportunities for all members employed by those in the bargaining unit. The Union may not attain this object

[7] See also *National Labor Relations Board* v. *Bangor Building Trades Council*, 278 F. 2d 287 (C.A. 1); *Local 636, United Ass'n* v. *National Labor Relations Board*, 278 F. 2d 858 (C.A. D.C.); *Local 5, United Ass'n* v. *National Labor Relations Board*, 321 F. 2d 366 (C.A. D.C.), certiorari denied, 375 U.S. 921; *National Labor Relations Board* v. *Enterprise Association, Etc.*, 285 F. 2d 642 (C.A. 2).

by a means which the Act proscribes, *i.e.*, by striking an employer, who, even though he may be in the same unit, did not cause the dispute and is powerless to affect it except by discontinuing business relations with the employer who did. See *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U.S. 675, 688–689.

The decision below is not inconsistent with *National Labor Relations Board* v. *Truck Drivers Union No. 449*, 353 U.S. 87, and *National Labor Relations Board* v. *Brown*, 380 U.S. 278 (Pet. 6–8). In those cases, the Court found that the means used by the non-struck members of a multi-employer unit to defend the integrity of that unit (a temporary layoff in *Truck Drivers*, and the hiring of temporary replacements in *Brown*) were permissible under the Act. In this case, however, petitioner did not strike Balsam on the theory that a contract violation by any one employer is a violation by all those in the unit. Whatever may be the law in that situation, it does not apply when, as here, the purpose of the strike is to cause the second employer to cease dealing with the first.

2. There is no substance to petitioner's argument (Pet. 11–13) that, because Balsam was performing work for Old Dutch on the same premises, the two should be regarded as one employer for purposes of Section 8(b)(4)(B). That contention was expressly rejected in *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U.S. 675, 689. As the court below pointed out (Pet. A–6), that case holds that when, "we have two *independent contractors* who are oper-

ating from the same situs—the relationship between the two concerns is one of merely 'doing business'." The cases cited by petitioner (Pet. 13) are distinguishable, for in those situations, unlike here, the two employers were allied by family ties, common ownership, or joint control (see Pet. A–6).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1965.

END